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Supreme Court, U.S.
FILED

JUL 03 2008

OFFICE OF THE CLERK

No. - 08-33

IN THE
Supreme Court of the United States

DEVON MONROE SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment requires that the decision to impound a vehicle for community caretaking purposes without a warrant be made in accordance with standardized police procedures.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Devon Smith respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit in *United States v. Smith*, No. 06-3112.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. 1a-24a) is published at 522 F.3d 305. The district court's opinion explaining the denial of petitioner's motion to suppress (Pet. App. 25a-33a) is not published but is available at 2005 WL 2746657.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2008. This Court has jurisdiction pursuant to 28 USC § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

This case presents an important Fourth Amendment issue over which the federal courts of appeals and state courts of last resort are openly and intractably divided: whether a warrantless impoundment of a vehicle violates the Fourth Amendment when police do not conduct it pursuant to standardized procedures. In this case, the Third Circuit held that an impoundment decision need *not* be made pursuant to standardized procedures, further exacerbating the split of authority on that issue.

1. On June 8, 2004, at approximately 4:19 in the afternoon, Lancaster police officers Christopher Laser and Richard Heim recognized petitioner Devon Smith in the passenger seat of a white Ford Taurus driven by Danny Santiago. Officer Heim was aware of an outstanding bench warrant for petitioner, so the officers pulled the vehicle over. Petitioner got out of the car and fled, but Officer Heim pursued him and arrested him. The officers also arrested Santiago for engaging in a physical altercation with Officer Laser. Officer Laser transported both arrestees to the police station, while Officer Heim stayed behind at the scene.

Officer Heim did not know who owned the car in which the arrestees had been riding, and no one else at the scene was immediately available to take possession of it. He presumably could have parked and locked the car on the side of the road or in a nearby parking lot. Instead, Officer Heim elected –

without seeking or obtaining a warrant – to impound the vehicle. He accordingly drove it to the police station.

In deciding to impound the car, Officer Heim was unaware of any standard procedure or policy his police department had regarding the impoundment of vehicles. Instead, as he later testified, "[i]n this situation this vehicle was impounded by my discretion." Pet. App. 10a. He explained that he decided to impound the vehicle "because neither the driver nor [petitioner] was the owner of the vehicle and we were going to try and contact the registered owner." Heim Dep. at 28-29. Officer Heim said that he was concerned that, if left on the street, someone with a "duplicate[] key" might use the car "for drugs." *Id.*

Officer Laser, who likewise was unable to point to any departmental policy governing when officers should take vehicles into custody, gave a different reason for the decision to impound the vehicle. He testified that the police impounded the vehicle in order to prevent "damage and vandalism." Tr. of Suppression Hrg. at 30.

At the station, during a warrantless inventory search of the vehicle, Officer Laser found a loaded semi-automatic handgun in the glove compartment. After waiving his *Miranda* rights, petitioner told police detectives that the gun was his and that he was aware that, as a convicted felon, he could not lawfully possess the weapon.

2. On May 3, 2005, a grand jury indicted petitioner on one count of unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(e). Following the indictment, petitioner filed a motion to suppress the handgun evidence. He argued that the warrantless impoundment of the vehicle, which led to the search and then the confession, was unconstitutional in part because it was not done pursuant to any standardized procedures.[1]

The U.S. District Court for the Eastern District of Pennsylvania denied the motion. The court did not dispute the premise that impoundments need to be conducted pursuant to standardized procedures. *See* Pet. App. 29a-30a. But even though the officers did not know of any standardized impoundment policy and even though Officer Heim acknowledged acting solely at his own discretion, the district court held that the Lancaster City Bureau of Police actually had a standardized impoundment policy because both officers testified that "they impounded the vehicle because both occupants had been taken into custody." Pet. App. 29a (quotation omitted). The district court further concluded that the impoundment was "not arbitrary or unreasonable" because the vehicle obstructed traffic and "was

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[1] Petitioner's girlfriend was the owner of the vehicle. Pet. App. 3a n.1. Because petitioner would have testified that his girlfriend had lent him the vehicle, the government did not contest petitioner's standing to challenge the constitutionality of the impoundment. Pet. App. 8a n.5.

located in a high-crime area and the officers sought to maintain the safety of the vehicle and its contents." Pet. App. 31a-32a.

Petitioner entered a conditional plea of guilty, but reserved his right to appeal from the denial of his suppression motion. The district court accepted the plea and sentenced petitioner to a term of 192 months in prison, followed by five years of supervised release, and also levied a $2000 fine.

3. The Third Circuit affirmed on a different ground. The court of appeals observed that "the District Court's finding that [Officer] Heim acted pursuant to a standardized procedure when he impounded the vehicle probably is erroneous." Pet. App. 12a. But the Third Circuit upheld the district court's judgment, ruling as a matter of law that the Fourth Amendment does not require standardized impoundment procedures in the first instance.

In so holding, the Third Circuit acknowledged that cases from other federal circuits "reflect[] a conflict" over this issue, and it recognized that it had to "decide which of . . . two lines of cases to follow." Pet. App. at 17a, 21a. The First Circuit recently held that, even absent standardized procedures, "impoundments of vehicles for community caretaking purposes are consonant with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances." Pet. App. 19a (quoting *United States v. Coccia*, 446 F.3d 233, 239 (1st Cir. 2006)). By contrast, the D.C. Circuit recently held

that "a community caretaking impoundment must be based on (1) a reasonable standard police procedure governing decisions on whether to impound vehicles and (2) and the police must follow the procedure in the case involved." Pet. App. 21a (discussing *United States v. Proctor*, 489 F.3d 1348, 1353-54 (D.C. Cir. 2007)).

The Third Circuit ultimately agreed with the First Circuit. Pet. App. 22a. The Third Circuit recognized this Court's holding in *Florida v. Wells*, 495 U.S. 1 (1990), that warrantless inventory searches – which typically are directly linked to warrantless impoundments – must be conducted according to standardized procedures. Pet. App. 14a n.7. The court of appeals further acknowledged that standardized procedures "tend to encourage the police to avoid taking arbitrary action." *Id.* at 23a. But the Third Circuit dismissed *Wells* (in a footnote) as "of little use here" because it focused on inventory searches. *Id.* at 14a n.7. And, like the First Circuit, it read this Court's statement in *Colorado v. Bertine*, 479 U.S. 367. 375-76 (1987), that police may impound cars without warrants "so long as that discretion is exercised according to standard criteria" as merely suggesting, but not requiring, such regulation. Pet. App. 19a, 22a.

Freed from the compass of this Court's precedent, the Third Circuit's concluded that all that is necessary to uphold a warrantless impoundment is a court's *post hoc* judgment – which it made here – that the police's impoundment decision reasonably

advanced community caretaking functions. Pet. App. 22a-23a.

REASONS FOR GRANTING THE WRIT

Warrantless inventory searches of vehicles consist of two steps: first, the police gain custody of the vehicle by seizing and impounding it; second, they search the impounded vehicle. This Court has squarely held that the Fourth Amendment requires that the second step be done according to standardized procedures. *See, e.g.*, *Florida v. Wells*, 495 U.S. 1, 4 (1990). But this Court has never definitively resolved whether failing to conduct the first step in accordance with standardized procedures likewise violates the Fourth Amendment. And in the absence of such clear guidance, federal courts of appeals and state courts of last resort have become deeply divided over the issue.

This Court should resolve this conflict of authority now. The question of how the Fourth Amendment operates in the context of impounding vehicles is a recurring and important one to the criminal justice system. It is squarely presented by this case. And the Third Circuit decision that no such procedures are necessary contravenes this Court's repeated admonition that standardized procedures are necessary to guard against officers invoking "community caretaking" interests as a ruse for impermissibly conducting investigatory searches without first seeking and obtaining warrants.

A. The State and Federal Courts Are Intractably Divided over Whether the Fourth Amendment Requires Police to Follow Standardized Procedures in Impounding Vehicles

It is a fundamental Fourth Amendment principle that a warrantless search or seizure of private property is constitutionally "unreasonable" unless it falls within one of "certain carefully defined classes of cases." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967). One such class of cases involves impounding and inventorying vehicles when necessary for "community caretaking." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

This Court has closely regulated such "community caretaking" actions to ensure that this exception does not become an end-round the general warrant requirement. In particular, this Court has repeatedly and unanimously held that warrantless inventories of impounded vehicles must be conducted according to "standard police procedures." *South Dakota v. Opperman*, 428 US. 364, 372 (1976); *see also, e.g., Florida v. Wells*, 495 U.S. 1, 4 (1990). Such established procedures help ensure that inventory searches are not merely "a ruse for a general rummaging in order to discover incriminating evidence" without a search warrant. *Wells*, 495 U.S. at 4; *see also Cady*, 413 U.S. at 441 (community caretaking actions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute").

This Court has indicated that the same principles apply equally to the antecedent decision to impound a vehicle. In *Colorado v. Bertine*, 479 U.S. 367 (1987), a police officer impounded the defendant's van after arresting him for drunk driving and discovered narcotics in an inventory search of the impounded vehicle. In the course of upholding that inventory search, this Court also noted that the officers' decision to impound the van satisfied the Fourth Amendment because it was done according to sufficiently standardized criteria: "Nothing in [the Court's precedents] prohibits the exercise of police discretion *so long as* that discretion is exercised *according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity.*" *Id.* at 375 (emphasis added).

But because the officers in *Bertine* acted according to standardized criteria, this Court did not need explicitly to say whether the impoundment would have violated the Fourth Amendment if the police officer had *not* acted according to such criteria. That is the question here – a question over which the federal courts of appeal and state supreme courts have become deeply divided.

1. After "assuming . . . that the Lancaster Police Department did not have a standard policy regarding the impounding and towing of vehicles," the Third Circuit held in this case that "a decision to impound a vehicle contrary to a standardized procedure or even *in the absence of a standardized procedure* should not be a per se violation of the Fourth

Amendment." Pet. App. 7a, 17a (emphasis added). So long as a court determines that the police officer's discretionary decision to impound the vehicle reasonably served community caretaking purposes, the police action, in the Third Circuit's view, is consistent with the Fourth Amendment.

The First Circuit and Ohio Supreme Court likewise deem a warrantless impoundment to be constitutional as long as reviewing judges believe that it reasonably serves the government's community caretaking interests. Like the Third Circuit, the First Circuit construes *Bertine* narrowly to merely recommend — but not require — standardized police procedures to guide impoundment decisions. The police, in the First Circuit's view, "cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities." *United States v. Coccia*, 446 F.3d 233, 239 (1st Cir. 2006) ((quotation omitted). Thus, impoundments may be "consonant with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances," even in the absence of standard police impoundment procedures. *Id.* at 239.

The Ohio Supreme Court reasoned simply that "*Bertine* requires standardized procedures with regard to inventory searches, not impoundment." *City of Blue Ash v. Kavanagh*, 862 N.E.2d 810, 813 (Ohio 2007). Accordingly, police in Ohio are permitted expansive, unregulated discretion in determining whether to impound vehicles.

2. In direct contrast to the Third Circuit's holding and the other cases in agreement with it, four federal courts of appeals and five state high courts have adopted a more structured approach to assessing impoundments under the Fourth Amendment. Specifically, these courts interpret *Bertine*'s acceptance of impoundment decisions "so long as . . . exercised according to standard criteria," 479 U.S. at 375, as requiring that impoundment decisions be made according to reasonable and standardized police procedures, rather than as a product of purely discretionary and unguided assessments of community caretaking interests.

Two federal courts of appeals and two state supreme courts have held that impoundments violated the Fourth Amendment because they were not done in accordance with established procedures. In *United States v. Proctor*, 489 F.3d 1348 (D.C. Cir. 2007), the D.C. Circuit expressly rejected the First Circuit's holding in *Coccia* that a community caretaking impoundment is reasonable even if it does not follow standardized procedures. The D.C. Circuit read *Bertine* as "suggest[ing] that a reasonable, standard police procedure *must* govern the decision to impound." *Id.* at 1353 (emphasis added). Because the officers in the case before it did not follow the procedures that were in place, the court of appeals held that the impoundment violated the Fourth Amendment. *Id.* at 1354-55.

The Idaho Supreme Court has reached the same conclusion. Reasoning that *Bertine* requires police discretion concerning whether to impound vehicles to be "exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity," the court held that an impoundment violated the Fourth Amendment because readily available information would have revealed that the officers lacked authority under the police department's standardized criteria governing impoundments of vehicles. *State v. Weaver*, 900 P.2d 196, 199-200 (Idaho 1995).

The Seventh Circuit held in *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996), that a vehicle impoundment violated the Fourth Amendment because it was not done pursuant to an impoundment policy that was "sufficiently standardized under *Wells*." *Id.* at 352. The court reasoned that although an impoundment policy need not be "written," police officers "must" act according to criteria that "standardiz[e] . . . the circumstances in which a car may be impounded." *Id.* at 351.[2]

Reaching the same result in another case, the Indiana Supreme Court held that in order to justify a

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[2] The Third Circuit suggested that *Duguay* did not squarely conflict with its decision here because *Duguay* also held that the impoundment of the vehicle was unreasonable even apart from the lack of any standardized policy. Pet. App. 15a-17a. But *Duguay* made clear that this discussion was a second, entirely "independent reason[]" for finding that the Fourth Amendment had been violated. 93 F.3d at 351

warrantless impoundment in terms of community caretaking, "the prosecution must demonstrate . . . that the decision [to impound] was in keeping with established departmental routine or regulation." *Fair v. State*, 627 N.E.2d 427, 433 (Ind. 1993). Even though the officers there testified that they impounded the car because they had arrested the driver and they were worried it would "be exposed to theft or vandalism or might otherwise become a nuisance," the court held that the impoundment violated the Fourth Amendment because it was done in "the absence of evidence about any departmental procedures." *Id.* at 433, 435.

A number of other courts have recognized, in the course of upholding searches because they complied with standardized impoundment procedures, the constitutional necessity of having such procedures. *See United States v. Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) ("Some degree of 'standardized criteria' or 'established routine' must regulate [decisions to impound vehicles], which may be conducted without the safeguards of a warrant or probable cause, to ensure that impoundments and inventory searches are not merely 'a ruse for general rummaging in order to discover incriminating evidence.'") (quoting *Wells*, 495 U.S. at 4); *Miranda v. City of Cornelius*, 429 F.3d 858, 863 (9th Cir. 2005) ("[W]hile the Supreme Court was not prepared to mandate any particular rules as to when impoundment incident to arrest for a traffic violation was permissible, impoundment is *not* a matter which can simply be left to the discretion of the individual officer.") (quoting 3 Wayne R. LaFave, Search and Seizure: A

Treatise On The Fourth Amendment § 7.3, at 624 (4th ed. 2004) (emphasis in original)); *Thompson v. State*, 966 S.W.2d 901, 904 (Ark. 1998) ("[T]he police may impound a vehicle and inventory its contents *only if* the actions are taken in good faith and in accordance with standard police procedures or policies.") (emphasis added); *State v. Huisman*, 544 N.W.2d 433, 437 (Iowa 1996) ("[P]olice may lawfully choose to impound a vehicle *so long as* that decision is made 'according to standardized criteria . . . .'") (emphasis added) (quoting *Bertine*, 479 U.S. at 375); *People v. Toohey*, 475 N.W.2d 16, 25 (Mich. 1991) (Because "[t]he public policy concerns and the purpose for impounding an arrested person's automobile are similar to those for conducting inventory searches[,] . . . it is appropriate to apply the same standard for determining the constitutionality of the initial impoundment of an automobile as for a subsequent inventory search, *i.e.*, an established set of procedures which the police must follow in making the determination whether to impound and not used as a pretext for conducting a criminal investigation.").

3. Because this conflict over the necessity of standardized police procedures is deeply entrenched and turns on how to interpret this Court's precedent, this Court is the only institution that can resolve the dispute. The need to do so is particularly pressing here where the circuit split has been widely acknowledged. *See, e.g.*, Pet. App. 21a (noting that "[i]n the face of the precedent that we have cited we must decide which of the two lines of cases to follow"); *Proctor*, 489 F.3d at 1353, 1354 (contrasting the

views of "[a]t least two of our sister circuits" and "[o]n the other hand, the First Circuit," before siding with the former).

B. The Question Presented Arises Frequently and Is Extremely Important

Even three decades ago, the police practice of impounding and searching vehicles for non-investigatory purposes was considered "increasingly common." *United States v. Piatt*, 576 F.2d 659, 661 (5th Cir. 1978). As inventory searches "have become a matter of standard police procedure," the decision to impound has emerged as "the more important step." Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 352 (1999). Today, police impoundments of vehicles occur with great frequency, particularly when an occupant of the vehicle has been arrested. *See generally* 3 Wayne R. LaFave, Search and Seizure: A Treatise On The Fourth Amendment § 7.3, at 612-13 (4th ed. 2004). Since impoundments routinely lead to inventory searches, and inventory searches often lead to evidence introduced in criminal trials, the admissibility of core pieces of evidence at numerous criminal trials is directly affected by the Fourth Amendment standard applicable to warrantless impoundments.

The question of how to apply the community caretaking exception to the Fourth Amendment's warrant and probable cause requirement is therefore a recurring and important one to the criminal justice

system. To leave the law unresolved on an issue that regularly arises is to leave police officers hazarding guesses as to whether their actions are lawful under the Fourth Amendment. Prosecutors, defense lawyers, and courts also need to know whether evidence obtained as the result of impoundments can be used to pursue criminal prosecutions.

Finally, the current confusion in the law may soon lead to the anomalous scenario of one jurisdiction being faced with two competing Fourth Amendment standards. For example, the supreme courts of Michigan and Ohio have split on this issue, and when the Sixth Circuit decides the matter, its resolution will necessarily be inconsistent with the prevailing law in one of those states. As a result, conflicting signals will be sent to local police departments, which will face different regulatory regimes depending on whether a prosecution is in state or federal court. It is thus imperative that this Court resolve the split in authorities and clarify the Fourth Amendment principles that govern vehicular impoundments.

C. This Case Is an Ideal Vehicle for This Court to Resolve the Question Presented

This case presents a perfect opportunity for this Court to resolve the split of authority over whether the Fourth Amendment requires the police to follow standardized procedures in deciding to impound a vehicle without a warrant and without probable cause. The sole issue decided by the court of appeals was whether Officer Heim's impoundment decision

was unconstitutional because it was not based on standardized procedures. The factual backdrop for this claim was Officer Heim's testimony that "this vehicle was impounded by my discretion." Pet. App. 10a. Accordingly, the Third Circuit – following the government's suggested order of analysis – expressly decided the case "on the premise on which Smith presents it, *i.e.*, the Lancaster Police Department did not have a standard policy regarding the impoundment and towing of vehicles." Pet. App. 12a.

Furthermore, the question presented is outcome determinative here. Officer Heim's decision to impound the vehicle in which petitioner had been riding led directly to the police finding the gun that supports the felon-in-possession conviction here. If the impoundment violated the Fourth Amendment, the gun would have to be suppressed and petitioner's conviction would need to be reversed.

D. The Third Circuit's Decision Is Inconsistent with This Court's Impoundment and Inventory Search Jurisprudence

This Court's precedent dictates, contrary to the Third Circuit's holding, that just as a post-impoundment inventory search must be conducted pursuant to standardized procedures, so too must an initial warrantless impoundment. And even if this issue were a completely open one, the Third Circuit's analysis would still incorrectly assess the competing interests at stake.

1. In *Florida v. Wells*, 495 U.S. 1 (1990), this Court held unanimously that when an inventory search of an impounded vehicle is not conducted pursuant to a standardized procedure, it is "not sufficiently regulated to satisfy the Fourth Amendment." *Wells*, 495 U.S. at 4-5. Summarizing a series of decisions that developed this rule, the Court explained that the need for "standardized criteria" or "established routine . . . is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence. . . . The individual police officer must not be allowed so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime." *Id.* at 4 (internal quotations and citations omitted); *see also South Dakota v. Opperman*, 428 U.S. 364, 374-76 (1976); *Cady v. Dumbrowski*, 413 U.S. 433, 441 (1973).

This principle applies with equal force to impoundment decisions. Decisions to impound and take inventory of vehicles are components of a single process that result in officers conducting warrantless and suspicionless searches. In fact, they are often discussed as one doctrine with two steps – "the automobile impoundment and inventory doctrine." *See, e.g., Laney v. State*, 117 S.W.3d 854, 860 (Tex. Crim. App. 2003). And both steps present the same risk that officers might attempt to subterfuge the warrant requirement. So it would make little sense to require that one step be conducted according to regularized procedures while allowing individual

police officers free reign with respect to the other step.

Indeed, in *Bertine*, this Court anticipated the precise set of facts presented here and indicated that a warrantless impoundment, like a warrantless inventory search, should be conducted in accordance with standardized procedures. Specifically addressing the constitutionality of an impoundment (and by extension the resulting inventory search), this Court explained:

> Bertine finally argues that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place. The Supreme Court of Colorado did not rely on this argument in reaching its conclusion, and we reject it. Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion *so long as that discretion is exercised according to standard criteria* and on the basis of something other than suspicion of evidence of criminal activity. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it.

479 U.S. 367, 375-76 (1987) (emphasis added).

The Third Circuit, however, was unmoved by this Court's precedent. It dismissed *Wells* in a footnote, asserting that its reasoning "is of little use here" because it focused on an inventory search instead of an impoundment decision. Pet. App. 14a n.7. And it construed *Bertine* as merely *recommending* that standardized procedures govern impoundment decisions. Pet. App. 19a, 22a (quotation omitted). The court of appeals then reasoned that because the Fourth Amendment's ultimate touchstone is reasonableness, a purely discretionary impoundment decision is constitutional so long as a court views it as substantively reasonable. Pet. App. 16a, 24a.

This is all obfuscation and avoidance. As other courts have recognized, "[t]he public policy concerns and the purpose for impounding an arrested person's automobile are similar to those for conducting inventory searches." *Toohey*, 475 N.W.2d at 25. The Third Circuit did not even claim to the contrary. So *Wells* cannot be cast aside simply because it dealt with the inventory phase of impoundments and inventory searches. If anything, *Wells'* standardized-procedures rule requires that impoundment decisions be similarly regulated, lest police departments circumvent *Wells'* protection against pretextual investigative searches by adopting rote inventory policies but leaving it entirely up to officers whether to impound cars in the first instance.

Furthermore, when *Bertine* pronounced that police may exercise impoundment discretion "*so long*

as that discretion is exercised according to standard criteria," 479 U.S. at 375 (emphasis added), this Court did not merely "suggest" that police follow standardized criteria; it mandated it. That is what "so long as" means.

Finally, the Fourth Amendment's overarching reasonableness test is just as applicable to inventories as it is to impoundments – or, if one prefers, just as applicable to seizures as it is to searches. And this Court has held that warrantless inventory searches are "unreasonable" if they are done at the sole discretion of individual police officers. *See Wells,* 495 U.S. at 4.[3] Accordingly, resort to the ultimate touchstone of the Fourth Amendment does nothing to explain why warrantless impoundments – as opposed to warrantless inventory searches – need not be governed by standardized criteria.

The Third Circuit, in short, had no justification for cabining off *Wells* to only one phase of the two-step impoundment and inventory process. Indeed, prior to its change of course in *Coccia*, the First Circuit, in an opinion by then-Chief Judge Breyer,

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[3] This holding is not undermined by this Court's decision in *Virginia v. Moore*, 128 S. Ct. 1598 (2008). *Moore* reaffirms the longstanding principle that merely violating a state or local law cannot violate the Fourth Amendment. Here, by contrast, the very Fourth Amendment rule at issue is that officers must act according to some set of standardized procedures. *See* Br. for United States as *Amicus Curiae*, *Virginia v. Moore*, 128 S. Ct. 1598 (2008), at 12 n.3.

noted that "[t]he Supreme Court itself has held that police may impound a car [to prevent theft and vandalism], *provided they make their impoundment decision 'according to standard criteria* and on the basis of something other than suspicion of evidence of criminal activity.'" *United States v. Ramos-Morales*, 981 F.2d 625, 626 (1st Cir. 1992) (emphasis added) (quoting *Bertine*, 479 U.S. at 375). This precedent is well explicated in the U.S. Reports, and it is not for the federal courts of appeals or state courts to second-guess this requirement.

2. The Court of Appeals sought to justify its decisions to limit *Wells* and to push aside the guidance in *Bertine* based largely upon its own conception of good policy. Even if it were appropriate for the Third Circuit to decide this case on policy grounds untethered to this Court's prior precedent, its policy arguments would still fail on their merits.

a. According to the Third Circuit, it does not make sense to require the police to act according to standardized procedures when the circumstances indicate that a vehicle is "subject to being damaged, vandalized, or stolen," and no private person is available to move it. Pet. App. 22a. In other words, there is no reason, in the Third Circuit's view, to require police to act according to standardized procedures when their decision to impound a vehicle is substantively reasonable on its own terms. *Id.*

This argument proves far too much. "The point of the Fourth Amendment" is that, absent exigent

circumstances, police officers do not get to decide for themselves whether they are justified in searching or seizing private property. *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). If officers wish to conduct a search, they must secure approval from a neutral and detached magistrate, no matter how justified the officers' proposed actions might be. *Id.* at 14. Similarly, if officers want to arrest someone, they may do so only if that person is violating (or has violated) a duly enacted law, no matter how "objectively" wrong the person's conduct may be. Police may no more disregard these basic principles and act based on their own conceptions of reasonableness than they may impound vehicles without warrants simply because the facts indicate that they would be justified in doing so. That is part of what it means to operate a government according to the rule of law.

Indeed, this case vividly illustrates why several courts have decided that impoundments done in the absence of standardized procedures violate the Fourth Amendment, even when facts suggested that the impoundments may have been substantively justified. In *Duguay,* the Seventh Circuit noted that two officers involved in a warrantless impoundment not governed by any standardized procedures offered "inconsistent" testimony regarding their impoundment practices, giving rise to the inference that the officers' warrantless actions were really investigative in nature. 93 F.3d at 352. Other courts have noted similar concerns. *See Fair,* 627 N.E.2d at 435 (noting the "indicia of pretext which litter[ed] the record" in the case of a warrantless impoundment done in the absence of standardized procedures);

Ramos-Morales, 981 F.2d at 627 (Breyer, C.J.) ("The existence and uniform application of such standard procedures can help prevent" officers from using "'theft-prevention impoundment' (and the inventory search that usually follows) as a pretext for initiating searches for evidence of criminal activity.")

That precise concern is implicated here. When asked in pretrial proceedings why they impounded the vehicle in which petitioner had been riding, the two officers here gave two different explanations. Officer Heim testified that he decided to impound the vehicle in order to contact the registered owner, and because he feared the car might be stolen or later used in a drug transaction. Heim Dep. at 28-29. Officer Laser, by contrast, testified that the police impounded the vehicle in order to prevent damage and vandalism. Tr. of Suppression Hrg at 30. These are just the kind of questionable *post hoc* justifications for seemingly investigative searches that the standardized-procedures rule is designed to avoid.

In any event, the government's contention that "the police were obliged to impound the vehicle 'to protect it' from theft or vandalism" effectively "mak[es] up new police obligations after the fact where none existed before." *Duguay*, 93 F.3d at 352. The police do not, as a matter of course, impound all vehicles in "high crime" neighborhoods for which they cannot locate the owners at any given time. If they did, police departments in each of our Nation's major cities would impound tens of thousands of

vehicles per day. Accordingly, something else must have been driving the officers here. The requirement of standardized procedures ensures that this "something else" is an objectively legitimate factor unrelated to investigatory goals. This requirement should not be dispensed with.

b. The Third Circuit, echoing the First Circuit in *Coccia*, also asserted that requiring compliance with standardized procedures in making impoundment decisions would render police forces unable to respond to unanticipated circumstances. Pet. App. 23a; *see also Coccia*, 446 F.3d at 239. This assertion likewise lacks merit.

This Court has explained in the context of inventory searches that there is no conflict between requiring police to follow a set of standardized procedures designed to prevent arbitrary or improper behavior and allowing officers to respond to unforeseen circumstances: "[I]n forbidding uncanalized discretion to police officers conducting inventory searches, there is no reason to insist that they be conducted in a totally mechanical 'all or nothing' fashion. . . . A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." *Wells*, 495 U.S. at 4. Requiring police to conduct inventory searches according to standardized procedures, in other words, does not eliminate law enforcement's ability to exercise professional

judgment concerning unforeseen events. It simply channels and regularizes the use of that judgment.

So, too, with impoundment decisions. Nothing about a set of guidelines designed to guide discretionary decisions to impound vehicles necessarily forecloses officers from responding to unforeseeable circumstances when necessary to protect public safety. At the same time, it must be acknowledged that *most* reasons why officers would need to impound a vehicle without obtaining a warrant *can* be anticipated. Certainly, nothing is unusual about officers arresting people who were driving a car and being concerned about the car's safety if left unattended in "high crime area." One court, in fact, has described the concern that a vehicle, left unattended as a result of a custodial arrest, "will be exposed to vandalism or might otherwise become a nuisance" as a "typical" fact pattern. *Fair*, 627 N.E.2d at 433. Accordingly, there can be no doubt that the police department here, as in most cases, could have promulgated a set of guidelines that would have covered the situation the officers faced.

Indeed, the vast majority of police departments across the country appear already to have done just that. In case after case involving scenarios similar to the one here, officers have decided whether to impound cars – just as they are required to decide whether to conduct inventory searches – in accordance with standardized policies. *See, e.g.*,

supra at 13-14.[4] The Third Circuit never gave any reason – nor has the government ever suggested any – why the officers here could not have done so too.

The reality is that following standardized policies when deciding to impound cars not only protects individual privacy but also fosters effective law enforcement. As this Court repeatedly has stated, "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (alteration in original and quotation omitted); *accord Bertine*, 479 U.S. at 375 (same). Standardized criteria provide such a resource for the police, relieving officers of the need for guesswork and insulating their ultimate decisions

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[4] Many police departments have written motor vehicle impoundment guidelines or policies, which are often contained in the departments' official policy manuals. *See, e.g.*, Denver Police Dept. Operations Manual, Series 206, *available at* http://www.denvergov.org/Portals/326/documents/206.pdf; Minneapolis Police Dept. Policy Manual 7-701 to -708, *available at* http://www.ci.minneapolis.mn.us/mpdpolicy/7-700/7-700.asp; Madison Police Policy Manual § 7-400, *available at* http://www.ci.madison.wi.us/police/PDF_Files/PolicyandProcedureManual.pdf; Peoria Police Dept. Policy and Procedure Manual, Policy 6.05, *available at* http://www.peoriaaz.gov/PoliceDepartment/administration/docs/policy_manual/6_05.pdf; San Jose Police Dept. Duty Manual 2007, L-5210, *available at* http://www.sjpd.org/Records/Duty_Manual_2007_Electronic_Distribution.pdf. In February 1997, the International Association of Chiefs of Police (IACP) published a model policy on Motor Vehicle Impoundment, which is available for purchase on the organization's website, http://theiacp.org/.

against subsequent attack. This Court should review the Third Circuit's decision, lest it improperly provide cover for police departments whose lack of standardized policies, perhaps unwittingly, subvert the public good in myriad ways.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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July 2008

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-3112

UNITED STATES OF AMERICA
v.
DEVON MONROE SMITH,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Crim. No. 05-00257)
Honorable Eduardo C. Robreno, District Judge

Submitted under Third Circuit LAR 34.1(a)
March 7, 2008

BEFORE: FISHER, GREENBERG, and ROTH, Circuit Judges

(Filed: April 9, 2008)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. INTRODUCTION

This matter comes on before this court on an appeal from a final judgment of conviction and sentence in this criminal case entered on June 6, 2006, following appellant Devon Smith's conditional plea of guilty

after the District Court denied his motion to suppress. The circumstances of the case are straightforward. On June 8, 2004, Lancaster, Pennsylvania, police officers Christopher Laser and Richard Heim while on patrol observed Smith sitting in the passenger seat of an automobile that Danny Santiago was operating. Heim recognized Smith and was aware that there was an arrest warrant outstanding for him. Consequently, the officers stopped the vehicle and arrested Smith. Subsequently, Laser and Santiago got into an altercation during which Smith fled the scene. After additional officers arrived the police recaptured Smith and rearrested him. They also arrested Santiago at the scene of the stop.

The police did not know who owned the vehicle for neither Smith nor Santiago claimed to own it. Moreover, Santiago said he did not know who the owner was, its registration papers were not available, and Santiago did not know the location of the registration papers.[1] Furthermore, inasmuch as the police arrested both men neither could drive the vehicle which had no other occupants. Moreover, there was no one else available at the scene to take its possession.

These circumstances created a problem for Laser and Heim because they believed that they should not leave the vehicle at the place where they stopped it inasmuch as the conditions in the area led them to believe that if they did so the vehicle might be damaged, vandalized, or stolen. Therefore, Heim impounded the vehicle and drove it to the police station.

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[1] At the suppression hearing that we will describe below Laser testified that at some point after the search he discovered that Smith's girlfriend owned the vehicle.

At the station during a routine warrantless inventory search of the vehicle, Laser found a loaded semi-automatic handgun in its glove department. He then interrupted the search which he resumed after he obtained a search warrant for the vehicle. Subsequently, on the same day, in a statement that he has not renounced as untruthful, Smith told police detectives that he had loaded the weapon and placed it in the glove department.[2] He also told them that he knew that he was a convicted felon and was aware that because of that status he was not lawfully permitted to possess the weapon.

On May 3, 2005, a grand jury indicted Smith for unlawful possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g) and 924(c). Smith responded to the indictment by filing a motion to suppress the handgun as evidence. The District Court held an evidentiary hearing on the motion at which Heim. who was in Iraq, without objection by Smith, testified by video conference and Laser testified in person. Thereafter, by an order entered October 26, 2005, accompanied by a memorandum opinion, the court denied the motion to suppress. In its opinion the District Court held that the impoundment was lawful because Heim impounded the vehicle pursuant to police community caretaking function authority and Lancaster police use a standardized routine that they followed here to determine

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[2] In the District Court Smith unsuccessfully argued that his statement should be suppressed as the "fruit of the poisonous tree." Supp. app. at 41. In light of the result that we reach here that the seizure and search were lawful, there was no "poisonous tree."

whether to impound the vehicle. The court further held that the impoundment was "not arbitrary or unreasonable."[3] We quote judicial authority describing the parameters of the community caretaking function authority below.

On November 8, 2005, Smith entered a conditional plea of guilty to the indictment but preserved his right to appeal from the denial of his motion to dismiss. See Fed. R. Crim. P. 11(a)(2); *United States v. Zudick*, 523 F.2d 848, 852 (3d Cir. 1975). The District Court accepted the plea of guilty and later sentenced Smith to a 192-month custodial term to be followed by five years of supervised release. It also imposed a $2,000 fine.

Smith appeals making the following argument:

> The decision by a police officer to impound a vehicle must be exercised pursuant to standardized criteria or the seizure is unconstitutional. The testimony presented in this case established that Officer Heim was exercising his discretion when he opted to impound the vehicle and that there were no standard policies or procedures which circumscribed or otherwise limited that discretion. The district court thus clearly erred

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[3] The District Court also held that the impoundment was lawful under Pennsylvania law and inasmuch as Smith predicates his argument on this appeal solely on the Fourth Amendment and does not contend that the District Court's state law analysis was wrong we do not review that analysis. Of course, we could not uphold the impoundment merely because it was lawful under state law as it still would have to meet Fourth Amendment standards and the state law might not satisfy them. *See United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006).

> when it found as a fact that the officer was acting pursuant to a standardized routine when he decided to impound the vehicle. Accordingly, the evidence obtained as a result of the unconstitutional seizure of the vehicle should have been suppressed.

Appellant's br. at 12. Significantly, Smith does not contend that even if the impoundment was lawful the inventory search was not lawful. Consequently, we focus on the validity of the impoundment rather than the validity of the actual search of the vehicle.

II. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231 and we have jurisdiction pursuant to 28 U.S.C. § 1291. As we often have indicated, we exercise the deferential clear error standard in reviewing a district court's factual findings but exercise plenary review over its determination of legal issues. *See United States v. Perez*, 280 F.3d 318, 336 (3d Cir. 2002). In this case there is a sharp dispute of facts with respect to whether Heim was acting pursuant to a standardized routine when he decided to impound the vehicle. On the one hand, the government contends that, as the District Court held, the police followed a standardized routine in impounding the vehicle. On the other hand, Smith contends that Heim, rather than following a standard impoundment routine, simply exercised his discretion when impounding the vehicle as the Lancaster Police Department did not have standard policies or procedures which

circumscribed or otherwise limited that discretion. Nevertheless we need not determine whether the District Court clearly erred on the basis of the record before it when it found that Heim was acting pursuant to a standardized routine when he impounded the vehicle because even if the court's finding was erroneous, for the reasons we will set forth we are satisfied that the impoundment was lawful. Thus, we decide this case assuming, as Smith contends, that the Lancaster Police Department did not have a standard policy regarding the impounding and towing of vehicles.[4]

III. DISCUSSION

There was considerable evidence at the suppression hearing explaining the Lancaster Police Department's policy or lack of policy governing the im-

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[4] The government indicates in its brief that after the District Court adjudicated this matter and Smith appealed, the government itself discovered that the Lancaster Police Department has a written policy that the brief does not describe regarding the impounding and towing of vehicles. The parties apparently never brought this policy to the attention of the District Court and thus that court was not aware of the policy either when entering the order now on appeal or at any later date. Nevertheless, neither party has moved to remand the case to the District Court so that it might reconsider its decision in light of the policy and neither has moved to expand the record on this appeal to include this policy and, accordingly, we do not know what the policy is. We will not remand the case to the District Court to reconsider its decision in light of the policy and we have not expanded the record on our own motion to include the policy as Heim cannot have relied on the policy when he impounded the vehicle as he was not aware of it.

pounding of vehicles and why the police impounded the vehicle in which Smith was riding. It is understandable that inasmuch as Smith challenges the District Court's factual finding that Heim acted pursuant to that policy, in his brief he quotes the evidence at length. Even though we accept for purposes of this appeal Smith's contention that the District Court erred when it found that Heim acted pursuant to a standardized procedure when he impounded the vehicle we, too, will quote the evidence at length as it bears on the reasonableness of his action when he impounded the vehicle. Heim testified as follows:

> Q. So you would have been the individual who decided to impound the vehicle. Right?
>
> A. More than likely, yes.
>
> Q. Why was the vehicle impounded?
>
> A. Let me check my report here. Oh, actually, the reason the vehicle was taken into custody that day is because neither the driver nor Mr. Smith was the owner of the vehicle and we were going to try and contact the registered owner.[5]
>
> Q. Why did you have to impound the vehicle to contact the registered owner?
>
> A. Because a lot of times we leave vehicles on the street and they end up being stolen

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[5] The government does not contend that Smith does not have standing to challenge the impoundment because it stipulated in the District Court that even though he did not testify at the suppression hearing, if he had done so he would have explained that his girlfriend, who was the owner of the vehicle, had lent it to him at the time of the arrest. *See United States v. Baker*, 221 F.3d 438, 442 (3rd Cir. 2000).

later down the road. A lot of times these vehicles are loaned out for drugs and duplicate keys are made. It was just to ensure that the rightful owner gets the vehicle back.

Q. Is there any policy with respect to impoundment of vehicles?

A. It's not actually impoundment. I can't say that there are actually policies on impoundment. We do for other things concerning vehicles. Off the top of my head I don't know.

Q. So to your knowledge there is no standard procedure with respect to impoundment of vehicles. Is that right?

A. We have standard procedures for what we do with the vehicles after we take custody of them. As far as actually taking the vehicle initially, I can't-like I said, we have so many policies that it's hard to remember. A lot of times I will have to refer to the policy manual to make a decision on something.

Q. Let me put it to you simply. Do you know whether or not there is any standard procedure or policy in the Lancaster City Police Department with respect to the impoundment of vehicles?

A. No. I can't say specifically that I know for a fact.

Q. Does that mean that the officer at the scene gets to make the decision as to whether or not a vehicle is impounded?

A. Sometimes, yes, and sometimes a patrol supervisor will be contacted depending on the situation.

Q. But again, the officer or whoever is making the decision has the discretion to decide whether or not to impound a vehicle. Right?

A. Not always, no. If we're talking about a major crime-if it's a homicide or something, then that decision will be made by a supervisor or detective. In this situation apparently it was me who made the decision about it.

Q. But the point is, you have discretion in that regard. Right? You can impound it or not impound it, depending upon what you think is the best thing to do. Correct?

A. Again, that discretion is based upon the situation. In this situation this vehicle was impounded by my discretion.

App. at 29-31.

Laser testified as follows:

Q. And what happened to the vehicle?

A. The vehicle itself was driven back to the station by Sergeant Heim, brought in for impounding. At that time we were unaware of who the actual owner was, with neither subject taking responsibility for the vehicle. And with where it was parked, the location where it was out [sic], was not a location where we had a tendency to leave vehicles for non-residents in that area, due to damage and vandalism. And also for our policy at that

point, the car was in our custody, so we had a duty to care for it.

App. at 32.

Q. Okay. You also alluded under direct examination to a 'policy' of the Lancaster City Police Department to take vehicles into custody. Didn't you?

A. No, it was for handling of vehicles that are in our custody.

Q. Very well. So the policy that you are talking about is after the car has been taken into custody, how you take care of it and handle it. Right?

A. That is correct.

Q. Okay. And that would be basically the written policy that has been marked SH1, right?

A. Yes.

Q. So that, just so we are clear, that is the policy you were referring to under direct examination?

A. Yes.

App. at 33.

The government quotes little additional testimony in its brief urging us to uphold on the clear error standard the District Court's finding that Heim acted pursuant to a standardized routine when he impounded the vehicle. Rather, it seems to mix evidence tending to demonstrate the reasonableness of Heim's decision to impound the vehicle with evidence regarding the presence of a standard governing impound-

ment. Thus, the government tells us, quoting from Laser's testimony, that the vehicle was located at a place that the police did not have "a tendency to leave vehicles for non-residents in that area, due to damage and vandalism." Supp. app. at 12. It then contends that Laser's testimony only makes sense when he is "understood to be explaining that the police routinely impound vehicles in this same area, or areas like it, when no one is available to drive the car away." Appellee's br. at 31. Overall, after considering all of the testimony, we are of the view that the District Court's finding that Heim acted pursuant to a standardized procedure when he impounded the vehicle probably is erroneous. But we do not make a definitive determination on the point. Instead, as we have indicated that we will do, we will decide the case on the premise on which Smith presents it, i.e., the Lancaster Police Department did not have a standard policy regarding the impoundment and towing of vehicles when Heim impounded the vehicle.[6]

The question that we resolve on this appeal is, surprisingly, apparently open in this Court for the government recites in its brief that it "is unaware of any Third Circuit precedent directly addressing the precise legal claim presented by Smith," i.e., the constitutionality of a vehicle impoundment under the Fourth Amendment in circumstances in which there is no standardized policy regarding the impoundment and towing of vehicles. Appellee's br. at 23. We, too, are not aware of any direct precedent in this Court on the point and Smith does not cite any. There is, how-

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[6] Of course, the government now tells us that this is not so. *See supra* note 4.

ever, precedent on the issue in other courts, most significantly in the Supreme Court. Indeed, Smith primarily relies on *Colorado v. Bertine,* 479 U.S. 367 (1987). In *Bertine,* a police officer arrested Bertine for driving his van under the influence of alcohol. *Id.* at 368. After the arrest but before a tow truck arrived at the scene a second officer acting in accordance with standard local police procedures made an inventory search of the vehicle and found narcotics. *Id.* at 370-71. In the ensuing trial court proceedings the court suppressed the evidence and, after the state's unsuccessful appeal to the Colorado Supreme Court, the case reached the Supreme Court on the issue of the validity of the search under the Fourth Amendment.

The Supreme Court, after rejecting Bertine's challenges predicated on other theories that we need not recount, reached his final argument which it described and disposed of as follows:

> Bertine finally argues that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place. The Supreme Court of Colorado did not rely on this argument in reaching its conclusion, and we reject it. Nothing in [*South Dakota v. Opperman,* 428 U.S. 364 (1976)] or [*Illinois v. Lafayette,* 462 U.S. 640 (1983)] prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activi-

> ty. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

Id. at 375-76 (footnote omitted).[7]

Smith also relies on *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996). In *Duguay*, as here, the police made a vehicle inventory search following an impoundment. In the inventory search the police recovered cocaine which led to Duguay's prosecution for possession of cocaine with intent to distribute. *Id.* at 349. Duguay, who was a son of the vehicle's title holder, *see id.* at 353, moved in the district court to suppress the cocaine on Fourth Amendment grounds, challenging both the impoundment and the inventory search. The district court denied the motion and Duguay ultimately was convicted and sentenced.

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[7] Smith also cites and quotes the Supreme Court's opinion in *Florida v. Wells*, 495 U.S. 1 (1990), in which the Court held that inasmuch as the police "had no policy whatever with respect to the opening of closed containers encountered during an inventory search," the inventory search involved there in which the police found marijuana in a suitcase "was not sufficiently regulated to satisfy the Fourth Amendment." *Id.* at 5. Clearly, *Wells*, which involved an inventory search, is distinguishable from our case involving an impoundment and thus is of little use here. Similarly, *United States v. Salmon*, 944 F.2d 1106 (3d Cir. 1991), which the government but not Smith cites, is not helpful here as it deals with the need for standardized criteria or an established routine for inventory searches. *See id.* at 1119-24.

Duguay appealed and the Court of Appeals for the Seventh Circuit reversed. Though to a large extent the court of appeals in its opinion focused on the validity of the inventory search it also held that the police "did not articulate a constitutionally legitimate rationale for impounding Duguay's car." *Id.* at 352. Moreover, the court indicated that "[w]hile a written protocol is not sine *qua* non" for a lawful impoundment, the court "was not satisfied that the ... Police Department employs a standardized impoundment procedure." *Id.* at 351. The court indicated that "[t]he touchstone of Fourth Amendment analysis is 'reasonableness.' " *Id.* at 353. It also said that "[t]he decision to impound an automobile, unless it is supported by probable cause of criminal activity, is only valid if the arrestee is otherwise unable to provide for the speedy and efficient removal of the car from public thoroughfares as parking lots." *Id.*

In *Duguay* the court of appeals, in reversing the order denying the motion to suppress, pointed out that the police impounded the vehicle even though Duguay's girlfriend who had driven the vehicle to the place of his arrest, and remained at the scene, "had possession of the keys, and was prepared to remove the car from the street." *Id.* Moreover, another son of the title holder, Duguay's brother, also was present at the time of the arrest. *Id.* These circumstances led the court to indicate that the impounding of a vehicle for caretaking purposes "without regard to whether the defendant can provide for its removal is patently unreasonable" and that "if the purpose of impoundment is not investigative, ... in the absence of probable cause" it did "not see what purpose denying pos-

session of the car to a passenger, a girlfriend, or a family member could possibly serve."[8] *Id.*

We recognize that some language in *Duguay* supports Smith's argument. After all, the *Duguay* court was troubled because the police department there did not employ "a standardized impoundment procedure." *Id.* at 351. Overall, however, *Duguay* arguably, at least, supports a determination that the impoundment here was lawful under the Fourth Amendment. To start with the court emphasized that the "touchstone" of a Fourth Amendment analysis is "reasonableness." How could the touchstone be anything else for the Fourth Amendment, in terms, prohibits "unreasonable" searches and seizures? Thus, the adoption of a standardized impoundment procedure merely supplies a methodology by which reasonableness can be judged and tends to ensure that the police will not make arbitrary decisions in determining which vehicles to impound. These reasons for the adoption of a standardized impoundment procedure are compatible with the views of the Court of Appeals for the First Circuit which it set out in *United States v. Coccia*, a case that we discuss below, that under *Bertine* "an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment." 446 F.3d 233, 238 (1st Cir. 2006). Conversely, it should follow that a decision to impound a

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[8] Smith contends that "the community care-taking issue has no bearing on the question of whether the decision to impound the vehicle was made pursuant to standard criteria." Appellant's br. at 10 n. 2. We agree but we only are referring to it on the reasonableness issue.

vehicle contrary to a standardized procedure or even in the absence of a standardized procedure should not be a per se violation of the Fourth Amendment.

Of course, on the facts *Duguay* hardly is helpful to Smith. In *Duguay* if the police had not impounded the vehicle, Duguay's girlfriend, who had driven the car prior to its impoundment, could have driven the car away. Moreover, the police in *Duguay* did not have to concern themselves with identifying the owner of the vehicle and contacting him as the defendant was the owner's son and another son of the owner, who apparently was not arrested, was present when the police arrested Duguay.

There are two quite recent cases dealing with the issue at hand, *Coccia* and *United States v. Proctor*, 489 F.3d 1348 (D.C. Cir. 2007), reflecting a conflict with respect to its resolution between the Courts of Appeals for the First and District of Columbia Circuits. Indeed, *Proctor* indicated that in that case the government invited it "to adopt the First Circuit's conclusion [in *Coccia*] that an impoundment is reasonable so long as it 'serves the government's "community caretaking" interests'" but that it "decline[d] the invitation." *Id.* at 1354. We will review these conflicting cases in detail in the order that the courts decided them.

Coccia was indicted and then convicted at a jury trial for possession of a firearm while subject to a domestic restraining order in violation of 18 U.S.C. § 922(g)(8). *Coccia*, 446 F.3d at 236-37. The evidence showed that the police seized Coccia's vehicle when he arrived at his psychiatrist's premises in an upset and hostile mental state and police and FBI agents

were waiting for him. *Id.* at 236. After his vehicle was towed away the police searched it, initially without a warrant and then, after they found double-edged knives and a rifle case in the vehicle, with a warrant. *Id.* During the renewed search with a warrant the police found an assault rifle and approximately 1,300 rounds of ammunition.

In the district court Coccia moved to suppress the firearm as evidence on the ground that the police violated his Fourth Amendment rights by seizing the vehicle as he could have made other arrangements to remove it from the psychiatrist's driveway, a contention that he supported with evidence at the hearing on his motion. *Id.* at 236-37. The district court denied the motion as it held that the police's towing decision was reasonable in the circumstances confronting them. *Id.* at 237.

On appeal, although Coccia recognized that there is a community caretaking exception to the requirement of the Fourth Amendment that seizures be authorized by warrant, he contended that the exception was inapplicable "because the government failed to establish that the car was towed from [the psychiatrist's] property pursuant to standard operating procedures." *Id.* at 238. Coccia understandably relied in part on *Bertine* in arguing that the decision to impound must be made "according to standardized criteria." In *Coccia* the court described the community caretaking exception as follows:

> The community caretaking exception recognizes that the police perform a multitude of community functions apart from investigating crime. In performing this community

> caretaking role, police are 'expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety.' *United States v. Rodriguez-Morales*, 929 F.2d 780, 784-85 (1st Cir. 1991).... [T]he community caretaking function encompasses law enforcement's authority to remove vehicles that impede traffic or threaten public safety and convenience. *See S. Dakota v. Opperman*, 428 U.S. 364, 368-69 (1976).

Id. at 238.

The court of appeals rejected Coccia's argument as it read *Bertine* "to indicate that an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment." *Id.* The court of appeals pointed out that courts frequently have held "that impoundments of vehicles for community caretaking purposes are consonant with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances." *Id.* at 239. The court then reviewed the circumstances of the impoundment and held that even in the absence of a standardized impoundment procedures the search was reasonable. *Id.* at 240.

Proctor's result was very different from that in *Coccia*. In *Proctor* the defendant Proctor was convicted at a jury trial for possession of a firearm and ammunition by a felon in violation of 18 U.S.C. § 922(g)(1). 489 F.3d at 1349. The police initially ar-

rested Proctor for several motor vehicle offenses including operating a motor vehicle while intoxicated and driving under the influence of alcohol. *Id.* at 1350. Standard police procedure required the officers to impound his vehicle, apparently because its owner was not present and no one else was available to take custody of it. *Id.* At the scene of the arrest the officers conducted an inventory search of the vehicle and recovered a pistol from a bag in the trunk. *Id.* Proctor moved to suppress the evidence, contending that both the impoundment and the inventory search violated the Fourth Amendment. *Id.* at 1351. After the court denied his motion and he was convicted and sentenced he appealed.

On the appeal Proctor argued that both the impoundment and search of his vehicle violated the Fourth Amendment as the officers violated police department procedures in impounding and searching the vehicle. The court of appeals agreed with Proctor and reversed his conviction. Citing *Bertine,* the court of appeals indicated that the "Supreme Court has suggested that a reasonable, standard police procedure must govern the decision to impound." *Id.* at 1353. It also indicated, citing and quoting *Duguay* and *United States v. Petty,* 367 F.3d 1009, 1012 (8th Cir. 2004), that "[a]t least two of our sister circuits have held that the decision to impound must be made pursuant to a standard procedure." *Proctor,* 489 F.3d at 1353. As we already have indicated, the *Proctor* court took note of *Coccia* but declined the government's invitation to adopt *Coccia*'s conclusion that an impoundment to serve community caretaking inter-

ests is reasonable even if it does not follow standardized procedures. Rather, it held that "if a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment." *Id.* at 1354. Overall, we understand *Proctor* to require that to satisfy the Fourth Amendment a community caretaking impoundment must be based on (1) a reasonable standard police procedure governing decisions on whether to impound vehicles and (2) and the police must follow the procedure in the case involved.

In *Proctor* there were standards governing impoundment that in the circumstances surrounding Proctor's arrest required that unless he consented to the impoundment he had to be given an opportunity to make his own arrangements to remove the vehicle. The police, however, did not give him the opportunity to make those arrangements as they believed that inasmuch as no one else was present to remove the vehicle they had to remove it. Consequently, the court of appeals held that the impoundment violated the standard procedures and thus the Fourth Amendment.

In the face of the precedent that we have cited we must decide which of the two lines of cases to follow, the *Coccia* line focusing on the reasonableness of the vehicle impoundment for a community caretaking purpose, or the *Proctor* line favoring the more structured approach to the validity of such impoundments under the Fourth Amendment requiring that there be standardized police procedures governing impound-

ments that the police follow.[9] As we already have intimated we think that the *Coccia* outcome is correct and the facts in this case demonstrate why. Here the police stopped a vehicle with two occupants both of whom they then arrested and thus who could not drive the vehicle. The area in which they stopped the vehicle was one in which parked vehicles were subject to being damaged, vandalized, or stolen. Neither occupant owned the vehicle and the police did not know who did own it and, unless the police moved the vehicle, they would have had to leave it where they stopped it in a dangerous area and, accordingly, the vehicle would have been subject to being damaged, vandalized, or stolen. Indeed, Laser was so concerned about the situation that he explained that he believed the police had a "duty" to take care of the vehicle.

In view of the circumstances here we believe that it hardly would be possible to make a plausible argument that Heim acted unreasonably in impounding and removing the vehicle. Indeed, while we will not go so far as to suggest that the police would have been irresponsible if Heim had not removed the vehicle we recognize that a legitimate argument could be made that they would have been.

In reaching our result we have not overlooked that, as we indicated above, it may be desirable that the police execute impoundments for community ca-

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[9] There is no doubt that in our case the impoundment was for community caretaking rather than investigative purposes for which probable cause would have been required. In this regard, we point out that there is no suggestion in the record that the police believed that the vehicle had been stolen or had been used in the commission of a crime.

retaking purposes pursuant to standardized procedures because the requirement that they do so will tend to encourage the police to avoid taking arbitrary action. Therefore, we certainly do not suggest that police departments should not adopt standard impoundment policies. But the Fourth Amendment cannot be the foundation for an equal protection requirement that the police must have standardized impoundment procedures because the amendment does not have an equal protection component. Thus, a reasonable impoundment does not become unreasonable merely because the police do not impound all vehicles found in similar circumstances any more than an unreasonable impoundment becomes reasonable merely because all vehicles in similar circumstances are impounded. Moreover, Smith does not raise Fourteenth Amendment equal protection arguments.

Finally, we point out that the requirement that a community caretaking impoundment be made pursuant to a standard police procedure could lead to untoward results. For example, the applicable standards may have been set forth in regulations that have expired and, perhaps through oversight, not have been renewed. Furthermore, a challenged impoundment may have been in a jurisdiction in which impoundments are so rare that the authorities within it quite reasonably never have seen any need to adopt impoundment standards. Moreover, the standards might not deal with all the situations that could arise, a point that the *Coccia* court made. *Coccia*, 446 F.3d at 239.

IV. CONCLUSION

Overall we think that it is best that we judge the constitutionality of a community caretaking impoundment by directly applying the Fourth Amendment which protects people "against unreasonable searches and seizures." U.S. Const. Amend. IV. Inasmuch as the impoundment here was reasonable and Smith does not challenge the inventory search that followed the impoundment, we will affirm the order denying the motion to suppress and the judgment of conviction and sentence entered June 6, 2006.

APPENDIX B

United States District Court,
E.D. Pennsylvania.

UNITED STATES OF AMERICA
v.
Devon Monroe SMITH

No. CRIM.A.05-0257.
Oct. 24, 2005.

K. Kenneth Brown, U.S. Attorney's Office, Philadelphia, PA, for United States of America.

MEMORANDUM

ROBRENO, J.

I. INTRODUCTION

Defendant Devon Monroe Smith is charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(c). Defendant filed a motion to suppress evidence on August 1, 2005 (doc. no. 25) and the Government responded (doc. no. 27). Defendant argues that the impoundment of the vehicle occupied by Defendant, which led to the discovery of the firearm and subsequent confession, was unlawful.

On October 6, 2005 the Court held oral argument on the motion to suppress. Officer Christopher E. La-

ser testified for the Government. The Government also offered into evidence the September 7, 2005 deposition of Officer Richard Heim, pursuant to Federal Rule of Civil Procedure 15 and without objection by Defendant. Gov't Ex. SH3. Officer Heim is currently deployed in Iraq and was unavailable for the hearing.

II. FACTUAL BACKGROUND

On June 8, 2004 at approximately 4:19 p.m., Officers Laser and Heim of the Lancaster City Bureau of Police were assigned to routine patrol duty in a marked police car. Heim Dep., 7:16-8:11; Supp. Hrg., 5:16-24. While on patrol, Officer Heim observed Defendant sitting in the front passenger seat of a white Ford Taurus automobile. Heim Dep., 5:24-8:11; Supp. Hrg., 6:10-19. Officer Heim was aware that Defendant had an outstanding bench warrant through the Lancaster County Sheriff's Department. Heim Dep., 6:24-7:15, 18:25-20:6. Officer Heim previously reviewed the police lineup book, which listed outstanding warrants, and saw Defendant's name and photo. *Id.* The officers pulled over the vehicle. Supp. Hrg., 6:23-7:11.

Officer Heim observed Officer Laser in a physical altercation with the driver of the automobile, Danny Santiago. Heim Dep., 11:19-12:8; Supp. Hrg., 9:16-10:20. As Officer Heim ran to assist Officer Laser, Defendant fled the scene. Heim Dep., 12:9-24; Supp. Hrg., 11:6-19. Defendant was retrieved and arrested on the outstanding bench warrant. Heim Dep., 12:9-24; Supp. Hrg. 11:20-22. Mr. Santiago was arrested as well. Supp. Hrg., 11:23-25. Defendant and Mr.

Santiago were taken back to the police station. Heim Dep., 26:17-27:19.

Officer Heim remained at the scene and decided to impound the Ford Taurus. *Id.* at 28:2-12. The vehicle was brought to the police station. Supp. Hrg., 12:1-10. On June 8, 2004 at around 7:00 p.m., Officer Laser began an inventory search of the vehicle to account for valuables and to protect other property inside of the vehicle, pursuant to a written city police department policy. *Id.* at 12:23-13:10. When he opened the glove compartment, Officer Laser saw a black Glock, 9mm semi-automatic handgun. *Id.* at 15:17-16:1. Officer Laser stopped the inventory search, and applied for and obtained a search warrant for the Ford vehicle. *Id.* at 16:2-17:7. During the execution of the search warrant, Officer Laser seized the pistol, which was loaded with ten live rounds of ammunition. *Id.* at 19:6-20.

Later that same day, after Defendant waived his *Miranda* rights, Defendant admitted to loading the handgun, placing the handgun in the glove compartment, and knowing that he was a convicted felon and thus not permitted to possess the firearm. On May 3, 2004 the Grand Jury charged Defendant with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(c).

III. DISCUSSION

Defendant filed a motion to suppress the firearm and post-arrest statement (doc. no. 25). Defendant argues that the justification for the warrantless

search of the vehicle was inadequate. While Defendant asserted in his brief that both the impoundment and the inventory search itself were unlawful, at oral argument, Defendant narrowed the issue and challenged only the impoundment. Supp. Hrg., 39:20-40:2. Specifically, Defendant argues that: (1) the police department had no policy or standardized practice in place for the impoundment of vehicles, and (2) the removal of the vehicle for an inventory search merely because neither the Defendant nor the driver were the owners of the vehicle is not a legitimate ground. Thus, Defendant contends, the gun obtained through the inventory search should be suppressed, as should the confession "obtained through exploitation of the illegally seized evidence."

Defendant first argues that the Lancaster County Police Department failed to have a written policy or an established routine that governed the decision to impound a vehicle. Defendant points to *United States v. Duguay*, 93 F.3d 346 (7th Cir. 1996), to support his argument. In *Duguay*, the Seventh Circuit held that a police department must have standardized criteria to determine when a vehicle should be impounded. *Id.* at 351. The standardized criteria may either be delineated in a written policy or evidenced through a "standardized routine." *Id.* (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).

In *Duguay*, the Alton police department did not have a written policy in place. *Id.* The court then looked to the officers' testimony to determine if a "standardized routine" existed within the department. *Id.* One officer testified at the suppression hearing that all vehicles are impounded after the

person in control of the vehicle or the owner is arrested. *Id.* at 351-52. Another officer testified at the suppression hearing that any time an occupant of a vehicle is arrested (regardless of whether they are in control or the owner), the vehicle is impounded. *Id.* at 352. Then at trial, the first officer altered his initial testimony and testified consistently with the second officer, that any time an occupant is arrested the vehicle is impounded. *Id.* The court held that based on these inconsistencies, the Alton impoundment policy was not sufficiently standardized. *Id.*

The instant case is distinguishable. Even if there is not a sufficient written policy, a matter which the Court does not address here, the Court holds that there is a "standardized routine" that is followed by the officers of the Lancaster City Bureau of Police. The testimony of Officer Heim and Officer Laser is entirely consistent on this point. According to Officer Heim, when the vehicle cannot be removed by an occupant, the police will impound it. Heim Dep., 28:12-29:2. Similarly, Officer Laser testified that when no occupant can "tak[e] responsibility for the vehicle, they will impound it." Supp. Hrg., 12:1-10. Defense counsel at oral argument conceded that both officers testified that they impounded the vehicle because "both occupants had been taken into custody." *Id.* at 38:21-23.

Accordingly, based on the consistent and credible testimony of the two officers, the Court holds that the department policy regarding impoundment rises to the level of a sufficiently "standardized routine," *see*

Duguay, 93 F.3d at 351, to pass muster under the Fourth Amendment.[1]

Defendant next argues that even if the impoundment policy is sufficiently standardized, it lacks legal justification. Officer Heim testified that because both occupants of the vehicle were arrested and nobody was present to remove the vehicle, he decided to impound the vehicle,

> [b]ecause a lot of times we leave vehicles on the street and they end up being stolen later down the road. A lot of times these vehicles are loaned out for drugs and duplicate keys are made. It was just to insure that the rightful owner gets the vehicle back.

Heim Dep., 28:19-29:2. Likewise, Officer Laser testified,

> [W]e were unaware of who the actual owner was, with neither subject taking responsibility for the vehicle. And with where it was parked, the location where it was out, was not a location where we had a tendency to leave vehicles for non-residents in that area, due to damage and vandalism. And also for

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[1] At oral argument, defense counsel suggested that the policy is infirm because it vested discretion upon the police officers whether to impound. Supp. Hearing, 39:8-19. The Court disagrees that police discretion is improper "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of criminal activity." *Colorado v. Bertine*, 479 U.S. 367, 375 (1987). In this case, there is no suggestion that to the extent the officers exercised discretion, it was not fully consistent with the "standard criteria" or "on the basis of something other than suspicion of criminal activity."

> our policy at that point, the car was in our custody, so we had a duty to care for it.

Supp. Hrg., 12:1-10.

The Court holds that the removal of the vehicle in these circumstances, where neither occupant of the vehicle could remove it, is not arbitrary or unreasonable and it is justified under Pennsylvania law. Under 75 Pa. Cons. Stat. § 3352(c)(2),

> Any police officer may remove or cause to be removed to the place of business of the operator of a wrecker or to a nearby garage or other place of safety any vehicle found upon a highway under any of the following circumstances:
>
> ...
>
> (2) The person or persons in charge of the vehicle are physically unable to provide for the custody or removal of the vehicle.

75 Pa. Cons. Stat. § 3352(c)(2); *see also United States v. 1988 BMW 750IL*, 716 F. Supp. 171, 173-74 (E.D.Pa.), *aff'd*, 891 F.2d 284 (3d Cir. 1989) (holding that police properly seized vehicle under § 3352(c)(2) after stop of unlicensed drivers for motor vehicle violations); *Commonwealth v. Woody*, 679 A.2d 817, 819 (Pa. 1996) (authorizing post-arrest impoundment where no one was available to move the car, which was blocking the street); *Commonwealth v. Martinson*, 533 A.2d 750, 754 (Pa. Super. Ct. 1987) (authorizing post-arrest impoundment where both the driver and passenger were unfit to drive, the ownership of the vehicle was uncertain, and the vehicle would have been stranded on the highway).

Further, as in these circumstances, where the police had the option to either leave the vehicle unattended without notifying the owner or to remove the vehicle, the police are permitted to remove the vehicle in the interests of public safety and efficient movement of traffic. In Pennsylvania,

> [t]he authority of the police to impound vehicles derives from the police's reasonable community care-taking functions. Such functions include removing disabled or damaged vehicles from the highway, impounding automobiles which violate parking ordinances (thereby jeopardizing public safety and efficient traffic flow), and protecting the community's safety.

Commonwealth v. Hennigan, 753 A.2d 245, 255 (Pa. Super. Ct. 2000).

Here, both occupants of the vehicle were arrested. Mr. Santiago told Officer Laser that he did not know where the car registration was located, nor did he know who owned the car. Supp. Hrg., 9:16-24. The vehicle was parked five to seven feet from the curb, thereby blocking traffic. *Id.* at 7:12-20. The vehicle was also obstructing a bus stop. *Id.* Additionally, the vehicle was located in a high-crime area and the officers sought to maintain the safety of the vehicle and its contents.

In these circumstances, removal of the vehicle falls within the statutory authority of the police under 75 Pa. Cons. Stat. § 3352(c)(2) and the authority derived from the community care-taking function of the police.

Because the impoundment and inventory search was legitimate, Defendant's contention that the ensuing post-arrest statement "obtained as a product of an illegal search" must also be discarded. *See Wong Sun v. United States*, 371 U.S. 471 (1963).

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to suppress evidence is denied. An appropriate order follows.

ORDER

AND NOW, this 24th day of October, 2005, upon consideration of the motion to suppress evidence (document no. 25) filed by Defendant Devon Monroe Smith, it is hereby ORDERED that the motion is DENIED.

AND IT IS SO ORDERED.

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File Date:
Oct 8 2008

No. 08-33

In the Supreme Court of the United States

DEVON MONROE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the impoundment of a vehicle was unreasonable under the Fourth Amendment where the vehicle's occupants had both been arrested, the vehicle's owner was unknown, and the vehicle was obstructing traffic and a bus stop in its present location.

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In the Supreme Court of the United States

No. 08-33

DEVON MONROE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 522 F.3d 305. The opinion of the district court (Pet. App. 25a-33a) is not published in the Federal Supplement but is available at 2005 WL 2746657.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2008. The petition for a writ of certiorari was filed on July 3, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of possessing a firearm after having been convicted of a felony, in violation

of 18 U.S.C. 922(g)(1). He was sentenced to 192 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-24a.

1. On June 8, 2004, Lancaster, Pennsylvania, police officers Christopher Laser and Richard Heim were on routine patrol in a high-crime neighborhood. As the officers drove past a white Ford Taurus, Officer Heim recognized petitioner, the front-seat passenger, as someone for whom there was an outstanding arrest warrant. The officers stopped the Taurus. Pet. App. 3a, 26a, 32a.

The officers exited their patrol car and approached the Taurus. Officer Heim placed petitioner under arrest after receiving radio confirmation about the outstanding warrant, and escorted him back to the officers' patrol car. Gov't Supp. C.A. App. 63.

Officer Heim began conducting a search of petitioner's person and discovered a plastic baggie of crack in petitioner's right front pants pocket. Gov't Supp. C.A. App. 64. As he was continuing the search, Officer Heim realized that an altercation had broken out between Officer Laser and the driver of the Taurus. Pet. App. 26a; Gov't Supp. C.A. App. 64. Officer Heim ran to help Officer Laser, at which point petitioner and the driver both attempted to flee. Pet. App. 26a; Gov't Supp. C.A. App. 64-65. Officer Heim pursued the driver, tackled him, and placed him under arrest; Officer Laser and another officer apprehended petitioner some distance away. *Id.* at 65, 79. Neither petitioner nor the driver claimed to own the Taurus and the driver stated that he did not know who owned the vehicle or the location of any registration papers. Pet. App. 3a. Petitioner and the driver were taken to a police station. *Id.* at 26a-27a.

The Taurus had come to a stop between five and seven feet from the curb and was blocking traffic and obstructing a bus stop. Pet. App. 32a. Officer Heim, who had remained on the scene, decided to impound the Taurus and drove it to the police station. *Id.* at 3a, 27a. During a routine inventory search at the police station, Officer Laser found a loaded semi-automatic handgun in the Taurus's glove compartment. *Id.* at 4a. In an interview conducted after the handgun was found, petitioner waived his *Miranda* rights and admitted to loading the gun and placing it in the glove compartment. *Id.* at 27a. During that same interview, petitioner also admitted knowing that he was not permitted to possess a firearm. *Ibid.*

2. Petitioner was charged with one count of possessing a firearm after having been convicted of a felony. Petitioner moved to suppress the firearm and his post-arrest statements. The district court held a suppression hearing, at which it heard testimony from Officer Heim and Officer Laser. Pet. App. 4a, 27a.

The district court denied petitioner's motion to suppress. Pet. App. 25a-33a. The court noted that petitioner did not challenge the conduct of the inventory search itself but only the impoundment that had preceded it. *Id.* at 28a. The court "d[id] not address" whether the Lancaster Police Department had "a sufficient written policy" governing the impoundment of vehicles. *Id.* at 29a. Instead, the court concluded "that there is a 'standardized routine' that is followed by [Lancaster] officers" in conducting impoundments and that that "department policy * * * rises to a level of the sufficiently 'standardized routine' to pass muster under the Fourth Amendment." *Id.* at 29a-30a (citation omitted).

The district court also rejected petitioner's contention that the officers had lacked "legal justification" to impound the Taurus. Pet. App. 30a-31a. The court explained that Pennsylvania law authorizes police officers to remove vehicles from public streets "in the interests of public safety and efficient movement of traffic." *Id.* at 32a; see *id.* at 31a-32a (citing 75 Pa. Cons. Stat. Ann. § 3352(c)(2) (West 2006) and decisions by Pennsylvania courts). The district court noted that both of the Taurus's occupants had been arrested; that the officers had no way of ascertaining the car's true owner; and that the vehicle had come to a stop in a place where it was blocking traffic and obstructing a bus stop and in a high-crime area where cars were frequently vandalized. *Id.* at 30a, 32a. The district court concluded that "[i]n these circumstances, removal of the vehicle [fell] within the statutory authority of the police under 75 Pa. Cons. Stat. § 3352(c)(2) and the authority derived from the community care-taking function of the police." *Id.* at 32a. Petitioner entered a conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2). See Pet. App. 5a.

3. The court of appeals affirmed. Pet. App. 1a-24a. Like the district court, it "focus[ed] on the validity of the impoundment rather than the validity of the actual search of the vehicle" because petitioner "d[id] not contend" that the inventory search was unlawful "if the impoundment was lawful." *Id.* at 6a. The court of appeals also did not consider whether petitioner had "standing to challenge the impoundment" because the government had not contested the issue and had agreed that petitioner, had he been called at the suppression hearing, would have testified that the car belonged to his girl-

friend and that she had lent it to him at the time of the impoundment. *Id.* at 8a n.5.

The court of appeal was "of the view that the [d]istrict [c]ourt's finding that [Officer] Heim acted pursuant to a standardized procedure when he impounded the vehicle" was "probably * * * erroneous." Pet. App. 12a. But it declined to "make a definitive determination on the point," *ibid.*, because, "even if the [district] court's finding was erroneous," it was "satisfied that the impoundment was lawful," *id.* at 7a. The court thus "assume[d]" for purposes of its decision "that the Lancaster Police Department did not have a standard policy regarding the impounding and towing of vehicles." *Ibid.*; see *id.* at 12a.[1]

The court of appeals stated that there was "no doubt" that the impoundment of the Taurus "was for community caretaking rather than investigative purposes." Pet. App. 22a n.9. The court further concluded that, in assessing the constitutionality of a community caretaking impoundment, the appropriate approach was to "directly apply[] the Fourth Amendment" and ask whether the impoundment was "reasonable" in light of the legitimate purposes for which vehicles may be impounded. *Id.* at 24a. And the court of appeals deter-

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[1] The court of appeals also observed that the government had stated in its brief that "after the [d]istrict [c]ourt adjudicated this matter and [petitioner] appealed, the government itself discovered that the Lancaster Police Department has a written policy * * * regarding the impounding and towing of vehicles." Pet. App. 7a n.4. The court of appeals stated that neither party had asked it to remand the case to the district court for further consideration in light of that policy and it declined to "expland[] the record on [its] own motion to include the policy as [Officer] Heim cannot have relied on the policy when he impounded the vehicle as he was not aware of it." *Ibid.*

mined that, "[i]n view of the circumstances here," there was no "plausible argument that [Officer] Heim acted unreasonably in impounding and removing the vehicle." *Id.* at 22a; see *ibid.* (stating that "a legitimate argument could be made that" the officers would have acted "irresponsibly if [Officer] Heim had not removed the vehicle").

The court of appeals distinguished this Court's decisions in *Colorado* v. *Bertine*, 479 U.S. 367 (1987), and *Florida* v. *Wells*, 495 U.S. 1 (1990). The court described *Bertine* as establishing that "an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment," and it stated that "[c]onversely, it should follow that a decision to impound a vehicle contrary to a standardized procedure or even in the absence of a standardized procedure should not be a per se violation of the Fourth Amendment." Pet. App. 16a-17a (quoting *United States* v. *Coccia*, 446 F.3d 233, 238 (1st Cir. 2006), cert. denied, 127 S. Ct. 1021 (2007)). The court of appeals also stated that *Wells* was "of little use here" because it involved the constitutional standards for the conduct of inventory searches rather than an initial impoundment. *Id.* at 14a n.7.

The court of appeals stated that "it may be desirable that the police execute impoundments for community caretaking purposes pursuant to standardized procedures" and it emphasized that it "d[id] not suggest that police departments should not adopt standard impoundment policies." Pet. App. 22a-23a. But the court reasoned that "the Fourth Amendment * * * does not have an equal protection component" and it concluded that "a reasonable impoundment does not become unreasonable merely because the police do not impound all

vehicles found in similar circumstances any more than an unreasonable impoundment becomes reasonable merely because all vehicles in similar circumstances are impounded." *Id.* at 23a. The court also stated that a "requirement that a community caretaking impoundment be made pursuant to a standard police procedure could lead to untoward results." *Ibid.* It cited examples such as situations where "standards may have been set forth in regulations that have expired and, perhaps through oversight, not have been renewed," "standards [that] might not deal with all the situations that could arise," and "jurisdiction[s] in which impoundments are so rare that the authorities * * * quite reasonably [have] never have seen any need to adopt impoundment standards." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 17-28) that the impoundment of the Taurus violated his rights under the Fourth Amendment. The court of appeals correctly rejected that claim, and there is no direct conflict between its decision in this case and any of the other lower court decisions cited by petitioner. In any event, this case would not be an appropriate vehicle for resolving any tension among the lower courts about the role of standardized impoundment procedures in assessing the constitutionality of impoundments that are justified for purposes other than investigating crime.

1. The issue presented by this petition for a writ of certiorari is a narrow one. Petitioner does not challenge the initial stop of the Taurus. He does not challenge his own arrest and he does not attempt to challenge the arrest of the driver. Petitioner likewise does not dispute that if the initial impoundment was lawful, the resulting

inventory search complied with the Fourth Amendment. Instead, petitioner's sole claim is that it was constitutionally unreasonable for Officer Heim to impound the Taurus unless "the decision to impound [it was] made in accordance with standardized police procedures." Pet. i. That claim lacks merit.

"The ultimate standard touchstone set forth in the Fourth Amendment is reasonableness." *Cady* v. *Dombrowski*, 413 U.S. 433, 439 (1973); accord *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006). This Court has long noted that "[p]assengers, no less than drivers, possess a reduced expectation of privacy" when traveling in cars. *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999). An automobile "seldom serves as one's residence or as the repository of personal effects," and it "travels public thoroughfares where both its occupants and its contents are in plain view." *New York* v. *Class*, 475 U.S. 106, 112-113 (1986) (citation omitted). A person's reasonable expectation of privacy in a car is further diminished by the government's "pervasive regulation" of automobiles, *id.* at 113, and by the possibility of "traffic accidents that may render all [of a car's] contents open to public scrutiny," *Houghton*, 526 U.S. at 303.

In addition, the Court has explained that police officers are often called upon to perform "community caretaking functions" with respect to automobiles that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Dombrowski*, 413 U.S. at 441. "[A]utomobiles are frequently taken into police custody" in order to protect "both the public safety and the efficient movement of vehicular traffic," and this Court has described "[t]he authority of police to" do so as "beyond chal-

lenge." *South Dakota* v. *Opperman*, 428 U.S. 364, 368-369 (1976).

This Court has stated that, once a vehicle has been impounded, officers may conduct an inventory of its contents so long as they do so pursuant to "standardized criteria or established routine." *Florida* v. *Wells*, 495 U.S. 1, 4 (1990) (citing *Opperman*, 428 U.S. at 372, and *Illinois* v. *Lafayette*, 462 U.S. 640, 648 (1983)); see *Colorado* v. *Bertine*, 479 U.S. 367, 374 n.6 (1987). The purposes of an inventory search are to "protect[] * * * the owner's property while it remains in police custody," "protect[] * * * the police against claims or disputes over lost or stolen property," and "[p]rotect[] * * * the police from potential danger" from items in the vehicle. *Id.* at 382; accord *Whren* v. *United States*, 517 U.S. 806, 811 n.1 (1996). The Court has justified looking to "standardized criteria" "based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"; the criteria thus must be designed to ensure that an "individual police officer [does] not [have] so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" *Wells*, 495 U.S. at 4 (quoting *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring)).[2]

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[2] In an earlier case, this Court upheld an inventory search without requiring standardized criteria, explaining that such a search was reasonable to serve valid interests once a car has been impounded. See *Cooper* v. *California*, 386 U.S. 58, 61-62 (1967). In *Cooper*, the Court reasoned that, since the officers had to maintain the car in their custody for a forfeiture proceeding, they had the right to search it "for their own protection"—even if state law provided no authority for the inventory search. *Ibid.* *Cooper*'s approach better comports with this Court's contemporary Fourth Amendment jurisprudence. Once objective justifications exist for an intrusion, Fourth Amendment standards are

As the court of appeals correctly explained (Pet. App. 14a n.7), this Court's decision in *Wells* (see Pet. 18, 20, 21) dealt exclusively with the validity of an inventory search and did not say anything about the standards governing the initial impoundment. See *Wells*, 495 U.S. at 4-5. This Court's decision in *Bertine* (see Pet. 19-21) was also "concerned primarily with the constitutionality of an inventory search." *United States* v. *Coccia*, 446 F.3d 233, 238 (1st Cir. 2006), cert. denied, 127 S. Ct. 1021 (2007); see *Bertine*, 479 U.S. at 371-375; *id.* at 376-377 (Blackmun, J., concurring). In the penultimate paragraph of its opinion, the *Bertine* Court considered the defendant's alternate claim "that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place." *Id.* at 375. The Court rejected that argument. It stated that "[n]othing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activ-

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satisfied regardless of whether the intrusion violates state law. See *Virginia* v. *Moore*, 128 S. Ct. 1598 (2008) (so holding for arrests based on probable cause). And even when a search serves community protection goals rather than law enforcement interests, it is sufficient to point to circumstances objectively justifying the search, rather than asking whether the intrusion was pretextual. See *Brigham City*, 547 U.S. at 403-404 (so holding for the emergency aid doctrine). While the purpose of a state-created standardized-criteria rule is to avoid pretextual inventory searches, see *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring), that purpose is better served by simply asking (as in *Cooper*) whether the objective circumstances made the search a reasonable one. If they do, "whether state law authorized the search [i]s irrelevant." *Moore*, 128 S. Ct. at 1604 (discussing *Cooper*).

ity," and it concluded that both of those criteria were satisfied in the case before it. *Id.* at 375-376.

Bertine's discussion does not definitively resolve the impoundment issue. The cases it cited, *Opperman* and *Lafayette*, had addressed the circumstances under which officers may inventory the contents of an item; they did not address the constitutional restrictions on when an item may be taken into custody for community caretaking purposes. See *Lafayette*, 462 U.S. at 641 (stating that the item whose contents the officers inventoried was a shoulder bag that an arrestee had brought with him to the police station); *Opperman*, 428 U.S. at 365 (describing vehicle as "lawfully impounded"); see also *Coccia*, 446 F.3d at 238 (stating that "*Opperman* does not * * * concern impoundments"). Accordingly, the Court's conclusion that the impoundment at issue in *Bertine* satisfied the standards that its previous decisions had established for the conduct of inventory searches made it unnecessary for the Court to decide whether impoundments must invariably satisfy those requirements as well. See Pet. 9 (recognizing that "this Court did not need explicitly to say [in *Bertine*] whether the impoundment would have violated the Fourth Amendment if the police officer had *not* acted according to [standardized] criteria"). In addition, reading *Bertine* as establishing a minimum constitutional threshold for impoundment decisions would be "at odds with the thrust of * * * the opinion of the Court in that case," *Wells*, 495 U.S. at 3, which, as noted previously, was concerned principally with the constitutional restrictions on inventory searches and did not consider whether impoundment decisions should be subject to precisely the same ones.

As the court of appeals correctly recognized (Pet. App. 22a), the circumstances of this case "demonstrate why" a per se rule that police officers may not impound vehicles unless there are standardized procedures governing such impoundments is unwarranted. When Officer Heim decided to drive the Taurus to the police station, both of the vehicle's occupants had been arrested and the officers' attempts to identify its lawful owner had failed. *Id.* at 22a, 32a. The vehicle could not be left in its present location, which was "five to seven feet from the curb" and in a spot where it was "blocking traffic" and "obstructing a bus stop." *Id.* at 32a. The Taurus was also in a high-crime area where Officer Heim knew that vehicles left on the street were frequently stolen or vandalized. *Id.* at 30a, 32a. Those objective facts made the impoundment decision reasonable, whether or not other police officials had anticipated those circumstances and established standardized criteria.[3] Cf. *Virginia* v. *Moore*, 128 S. Ct. 1598, 1605 (2008) (stating that this Court has generally "thought it obvious that the Fourth Amendment's meaning did not change with local law enforcement practices—even practices set by rule"). Accordingly, Officer Heim's decision to impound the Taurus was constitutional, regardless of whe-

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[3] Petitioner's observation (Pet 24) that "police do not, as a matter of course, impound all vehicles in 'high crime' neighborhoods for which they cannot locate the owners at any given time" is true but irrelevant. When officers encounter a car parked lawfully on the side of the road, the natural inference is that the owner has decided to park it there and to assume any risk of vandalism or theft that may result. Here, in contrast, the Taurus was stopped where it was because of the officers' traffic stop and they had no reason to believe that the car's then-unknown owner would have wanted to leave it there. At any rate, the issue is not whether Officer Heim had other alternatives but whether the course he chose was constitutionally reasonable.

ther the Lancaster County Police Department had a standardized policy addressing vehicle impoundments.[4]

2. Petitioner fails to identify any "deep[]" (Pet. 9) or "[i]ntractabl[e]" (Pet. 8) conflict among the lower courts with respect to the question presented here. The specific claim that the court of appeals rejected was that a police officer invariably violates the Fourth Amendment when he impounds a vehicle for community caretaking purposes in a situation where "there [a]re *no* standard policies or procedures which circumscribe[] or otherwise limit[] [the officer's] discretion" to do so. Pet. App. 5a (quoting Pet. C.A. Br. 12) (emphasis added). As petitioner acknowledges (Pet. 10), the court of appeals' rejection of that claim accords with the decisions of the First Circuit and the Supreme Court of Ohio. See *Coccia*, 446 F.3d at 238-239; *City of Blue Ash* v. *Kavanagh*, 862 N.E.2d 810, 813 (Ohio 2007).

There is no direct conflict between the decision below and any of the other decisions cited by petitioner. In *United States* v. *Proctor*, 489 F.3d 1348 (2007) (see Pet. 11), the D.C. Circuit concluded that the Washington, D.C., police department had standardized procedures

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[4] The court of appeals also stated that "[t]here is no doubt that" the decision to impound the Taurus "was for community caretaking rather than investigative purposes." Pet. App. 22a n.9. In *Brigham City*, this Court reiterated that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" 547 U.S. at 404 (quoting *Scott* v. *United States*, 436 U.S. 128, 138 (1978)). Accordingly, it "does not matter here—even if [his] subjective motives could be so neatly unraveled"—what subjective motives Officer Heim had for impounding Taurus. *Id.* at 405. The Fourth Amendment's protection against arbitrary action comes from the requirement of objective facts justifying the police action—not from an inquiry into subjective motives or a scripted set of criteria in a particular jurisdiction.

governing impoundments and that the officers in that case had violated those standards by impounding a vehicle. See *id.* at 1354-1355. Although the D.C. Circuit characterized this Court's decision in *Bertine* as "suggest[ing] that a reasonable, standard police procedure must govern the decision to impound," *id.* at 1353, the court's more narrow holding was that "*if* a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment," *id.* at 1354 (emphasis added). *Proctor*'s holding therefore does not reach the facts of this case. In addition, *Proctor* was decided before this Court's decision in *Virginia* v. *Moore*, *supra*, and the court of appeals thus had no opportunity to consider whether *Moore*'s rationale indicates that the objective circumstances confronting the officers, rather than state-created rules, should be the touchstone of reasonableness in deciding whether an impoundment is constitutional.

The same is true of *State* v. *Weaver*, 900 P.2d 196 (Idaho 1995). As petitioner acknowledges (Pet. 12), *Weaver* involved a situation in which the relevant police department had policies governing impoundments, and the court's conclusion that there had been a Fourth Amendment violation was expressly based on the fact that the officer should have known that his decision to impound the car violated those policies. See 900 P.2d at 199-200.

Nor is there any direct conflict between the court of appeals's decision in this case and the Seventh Circuit's pre-*Moore* decision in *United States* v. *Duguay*, 93 F.3d 346 (1996) (see Pet. 12). Although the *Duguay* court cited the lack of a standardized impoundment policy as one of "two independent reasons" warranting suppression in that case, 93 F.3d at 351, the court's analysis

largely focused on the unreasonableness of the decision to impound the vehicle. See *id.* at 353 (stating that a "policy of impounding the car without regard to whether the defendant can provide for its removal is patently unreasonable if the ostensible purpose for impoundment is for the 'caretaking' of the streets"); see also *id.* at 353-354 (suggesting that the impoundment may have violated state law). In addition, as the court of appeals explained (Pet. App. 17a), the facts of *Duguay* are "hardly * * * helpful to [petitioner]," because in that case the car's driver had not been arrested and could have driven the car away herself, and the officers knew that another passenger, who had also not been arrested, was the son of the car's owner.

Finally, there is no conflict between the decision below and *Fair* v. *State*, 627 N.E.2d 427 (Ind. 1993) (see Pet. 12-13). The defendant in *Fair* argued that the police may impound a vehicle for community caretaking purposes only if the decision to do so is "specifically authorized by statute." *Id.* at 432. The Indiana Supreme Court rejected that view, holding that "[w]hile impoundment pursuant to [motor vehicle or forfeiture statutes] is clearly proper," *id.* at 431, police officers may, "as a matter of federal constitutional law, * * * discharge their caretaking function whenever circumstances compel it," *id.* at 432. The court nonetheless determined that the impoundment in that case had violated the Fourth Amendment because: (1) "the State ha[d] made no effort to demonstrate that any Indiana statute authorized" the impoundment; (2) it was not clear that "reasons of public safety dictated that the car be towed"; (3) the record was "litter[ed]" with "indicia of pretext"; and (4) there was an "absence of evidence about any departmental procedures against which [the court] might

[have] evaluate[d] the[] significance" of the evidence of pretext. *Id.* at 433, 435. Here, in contrast, Pennsylvania law authorized impoundment of the Taurus (Pet. App. 31a-32a), considerations of public safety clearly justified moving it (*id.* at 32a), and "[t]here is no doubt that * * * the impoundment was for community caretaking rather than investigative purposes" (*id.* at 22a n.9). Cf. note 4, *supra*.[5]

3. Even if there were a direct post-*Moore* conflict among the lower courts about the constitutionality of impounding a car in the absence of any standardized procedures, which there is not, this case would not be a suitable vehicle for addressing it. After hearing testimony from both Officer Heim and Officer Laser, the district court expressly found "that there *is* a 'standardized routine' that is followed by the officers of the Lancaster City Bureau of Police." Pet. App. 29a (emphasis added). Although the court of appeals was "of the view that" that finding was "probably * * * erroneous," it did not "make a definitive determination" on that point, *id.* at 12a, and it likewise did not address the government's argument that the appropriate standard of review with respect to that issue was for clear error. See Gov't C.A. Br. 28-32; see also *Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001) (stating that, under the clear error standard, a reviewing court may "not reverse a lower court's finding of fact simply because [it] 'would have decided the case differently'" (quoting *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985)). Accordingly, even

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[5] As petitioner acknowledges (at 13) the statements he cites from various other lower-court decisions are all dicta because they were made in cases where the impoundments "complied with standardized impoundment procedures" and the courts rejected the defendants' Fourth Amendment claims.

if this Court were to hold that a community caretaking impoundment is per se unreasonable under the Fourth Amendment unless it is done pursuant to standardized procedures, petitioner would not obtain any relief unless either this Court or the court of appeals, applying the appropriate standard of review, were also to conclude that the district court erred with respect to its actual basis for denying petitioner's suppression motion. See also note 1, *supra* (noting that evidence that was not presented to the district court indicates that Lancaster City has a written policy governing vehicle impoundments).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008

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No. 08-33

Supreme Court, U.S.
FILED
OCT 15 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DEVON MONROE SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not dispute that the question whether the Fourth Amendment requires warrantless impoundments for community caretaking purposes to be made in accordance with standardized procedures is an important and recurring one in the criminal justice system. The government argues, however, (1) that no "direct conflict" exists on the issue; (2) that this is not a suitable case for addressing it; and (3) that the Third Circuit correctly held that no such standardized decision making is necessary is correct. None of these contentions withstands scrutiny.

1. The government argues, notwithstanding the Third Circuit's acknowledgment that its decision contributes to a "conflict" among the circuits, Pet. App. 17a, 21a, that no real split exists. The government is incorrect.

The Seventh Circuit and the Indiana Supreme Court have held that warrantless impoundments violate the Fourth Amendment when police officers order them in the absence of standardized criteria. *See United States v. Duguay,* 93 F.3d 346, 351-52 (7th Cir. 1996); *Fair v. State,* 627 N.E.2d 427 (Ind. 1993). The government asserts that the Seventh Circuit's decision "largely focused" on other matters and that the Indiana Supreme Court's decision similarly cited additional indicia that the impoundment in that case was suspect. BIO 15. The decisions, however, speak for themselves. And despite the government's attempts at glossing them over, the fact remains that both interpreted this

Court's precedent to require the very rule that the Third Circuit rejected here.

In addition, the D.C. Circuit, the Idaho Supreme Court, and the Minnesota Supreme Court (after the petition for certiorari was filed in this case) have held that police officers violate the Fourth Amendment when they impound a car in contravention of standardized procedures. *See United States v. Proctor,* 489 F.3d 1348, 1353-55 (D.C. Cir. 2007); *State v. Weaver,* 900 P.2d 196, 199-200 (Idaho 1995); *State v. Gauster,* 752 N.W.2d 496 (Minn. July 10, 2008). The necessary premise of those decisions – explicitly stated in each – is that a standardized procedure "must govern the decision to impound." *Proctor,* 489 F.3d 1353; *see also Weaver,* 900 P.2d at 199 (decision to impound must be made "according to standard criteria"); *Gauster,* 752 N.W .2d at 503 ("Impoundment of a motor vehicle must also be conducted pursuant to standardized criteria."). Otherwise, it would not matter whether officers abided by such criteria. Accordingly, despite the government's protestations, the Third Circuit was correct in acknowledging that its holding cannot be squared with the rule in the D.C. Circuit (and, by implication, the law of the Idaho and Minnesota Supreme Courts).

Contrary to the government's suggestion, nothing in this Court's recent decision in *Virginia v. Moore,* 128 S. Ct. 1598 (2008), alleviates the conflict with this latter batch of cases. *Moore* merely reaffirmed the longstanding principle that violating a state or local law restricting police investigatory authority does not violate the Fourth Amendment.

Moore did not even mention the *Wells* line of cases, much less call any of those cases into question. That was because, as *the government itself* recognized in expressly distinguishing *Wells* and *Proctor* from *Moore,* officers that impound and inventory vehicles for community caretaking reasons are, by definition, not performing investigations based on individualized suspicion. Rather, they are conducting suspicionless searches and seizures, for which the Fourth Amendment requires some "protection against arbitrariness." Br. for United States as *Amicus Curiae* at 12 n.3, *Virginia v. Moore,* 128 S. Ct. 1598 (2008). This Court in *Wells* held that that protection must come in the form of standardized criteria. Accordingly, it is not officers' violations of local inventory or impoundment laws that *Wells* and *Proctor* deem unreasonable; it is the officers' failure to follow any protocol that constrains their discretion as to when they may dispense with the ordinary rules that govern investigatory searches and seizures.

2. The government also is incorrect in suggesting that this case is an inadequate vehicle for resolving the question presented. The Third Circuit – at the government's urging – squarely decided the issue, and the Third Circuit's holding is the sole basis for rejecting petitioner's Fourth Amendment argument. *See* Pet. for Cert. 17.

The government notes the district court found that the police *did* follow a standardized procedure in this case. BIO 16. But as petitioner has explained, the district court had no basis in evidence for making that assertion. Pet. for Cert 3, 17. Even the

government does not offer any defense of it. That is hardly surprising, given that the arresting officer himself admitted that he was unaware of any standardized criteria governing impoundments and that "this vehicle was impounded by my discretion." Pet. App. 10a.

In short, it clearly falls to this Court to decide whether impounding a car without a warrant and in the absence of any standardized criteria violates the Fourth Amendment. If it does, the Third Circuit's decision should be reversed and remanded.

3. The government's defense of the merits of the Third Circuit's decision is equally devoid of substance. The government acknowledges, as it must, that this Court unanimously has held that police officers may not conduct warrantless inventory searches for community caretaking reasons unless they act "pursuant to 'standardized criteria or established routine.'" BIO 9 (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990). So the Fourth Amendment permits the police to conduct warrantless *impoundments* for community caretaking reasons in the absence of standardized procedures only if the impoundment stage of "impoundments and inventory searches" is somehow different than the inventory stage.

Yet the government does not even advance any contention in this respect. Instead, the government simply argues that the Fourth Amendment permits suspicionless impoundments whenever the "objective facts" and circumstances make such action

reasonable. BIO 12.[1] But that is precisely the argument that this Court's inventory jurisprudence rejects. And this Court already has indicated in *Colorado v. Bertine*, 479 U.S. 367, 375-76 (1987), that that argument does not carry any more force in the context of suspicionless impoundments. Although the government is surely correct that *Bertine* does not "definitively resolve" this case, this Court can safely deduce, in the absence of any governmental contention that impoundments raise different constitutional issues than inventories, that the *Wells* requirement of standardized criteria should apply equally to impoundments.

Lest there be any doubt, overwhelming pragmatic considerations favor requiring warrantless impoundments to be conducted according to standardized criteria. Not only is a standardization requirement necessary to maintain consistency with inventory jurisprudence, but it offers exactly what the government says is essential "to guide the officer in the field when a recent occupant of a vehicle is arrested": a "bright-line" and easily administered rule. Br. for United States as Amicus Curiae at 7, *Arizona v. Gant,* No. 07-542. The government's

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[1] Instead of focusing on the two officers' asserted reasons (internally contradictory though they are) for impounding the vehicle at issue here, *see* Pet. for Cert. 3, the government advances yet a third purported reason why the officers impounded the vehicle – namely, that the vehicle supposedly was blocking traffic and a bus stop. BIO 12. These shifting *post hoc* rationales exemplify why this Court in *Wells* held that the constraining effect of standardized procedures is necessary to deter officers from taking investigatory measures under the pretext of their community caretaking function. *See* 495 U.S. at 4; Pet. for Cert. 23-24.

totality-of-the-circumstances approach, by contrast, would make every impoundment turn "on the facts of [the] particular case"; offer "little practical guidance"; and improperly "introduce uncertainty and line-drawing difficulties" into officers' professional decision making. *Id.* at 7, 8. This Court should grant review to ensure that does not happen.

CONCLUSION

For the foregoing reasons, as well as those in the petition for a writ of certiorari, the petition for writ of certiorari should be granted.

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October 2008